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Species protection

Some of the general issues that hopefully will emerge during our discussion are:

- Does the EC law do enough for the protection of species in MS and at worldwide scale?
- Does the MS law and practice do enough for effective protection of species and follow the EU requirements?; are there proposals for reforming national law or practice?
- What are the successes or the difficulties encountered in the process of implementation of the Habitats Directive and the Birds Directive (provisions on species protection)?
- What can be done to improve the protection of species within the EU, the Bern Convention? Do we need a new instrument/concept/principles of species protection?.
- Which specific problems hindered the species protection process (lack of data, overlapping administrative responsibility)?
- What about the reports by the Commission on the implementation of Birds and Habitats Directive in relation to species protection - are they sufficient and sufficiently frequent?

I. General background of the MS relevant for species protection

- a. **Is your national law based on a mixture of nature conservation laws and national hunting and fishing regulations; is there a separate regulatory system for specific group of species? Yes**
- b. **is the law concerning species protection at national level or regional level? The law is on national level**

The Nature Conservation Act (2004) can be pointed out to as **the general act which contributes to the protection of wild species and main act which contributes to the protection of specially protected wild species**¹. The implementation of the obligations arising from the EU law (in particular from the Directive 92/43/EC and the Directive 2009/147/EC) as well as international agreements within the scope of the protection of species and of their habitats comes into being particularly through the Nature Conservation Act.

The purpose of the species' protection is to:

- 1) ensure survival and appropriate quality of protection of species of plants, animals and fungi existing in the wild within the territory of Poland or in other Member States of the European Union, which are rare, endemic, vulnerable to threats and in danger of extinction as well as covered by protection on the basis of provisions of international agreements to which Poland is a party, as well as their habitats and refuges, as well as
- 2) preserve species' and genetic diversity .

¹ The purposes of nature conservation are *inter alia*: maintenance of ecological processes and the stability of ecosystems, preservation of biological diversity, ensuring continuity of species' existence together with their habitats, by maintaining or restoring them to the appropriate conservation quality, maintaining or restoring conservation of natural habitats to appropriate conditions

In addition to the NCA special legislative acts addressing wild species related issues are in force and can be divided into:

- sectorial acts focusing on specific group of wild species e.g.: game animals (the Law on Hunting 1995); fish (the Act on Inland Fishery 1985);
- sectorial acts focusing on the protection of respective environmental components relevant for the protection of species e.g.: the Act on Forest Act (1991), the Act on Farmland and Forestland Protection (1995), The Water Law Act (2001);
- horizontal acts focusing on the protection of the environment or its components, including the protection of the environment against certain threats which provide mechanisms and instruments supporting species protection e.g.: the EPL Act (2001), the Act on access to information about environment and its protection, public participation in environmental matters and environmental impact assessments (2008), the Act on the prevention and remediation of environmental damage (2007);
- acts not counted to “environment or nature protection legislation” but containing provisions relevant for the species protection as an element of the ‘environment’ e.g.: the Spatial Planning and Land Development Act (2003).

II. Introductory question

1. Risk

- a. **are there any official or other reports estimating what constitutes the main risk for protected species in your country: e.g. illegal hunting, infrastructure project, agricultural, the absence of the species action plans, insufficient species data; insufficient human resources, others)?**

According to the latest report on the conservation status of species covered by the Habitats Directive in Poland 33 % of the assessments were favourable in 2013 (EU27: 23 %), 37 % were unfavourable-inadequate (EU27: 42 %) and 13 % had unfavourable-bad status (EU27: 18 %).

As regards birds, 50% of the breeding species showed short-term increasing or stable population trends (for wintering species this figure was 11 %),

Intensive agriculture and human-induced modifications of natural conditions (e.g. of water ecosystems) together with invasive alien species have been identified as the greatest threats to biodiversity in Poland.

(The EU Environmental Implementation Review Country Report – POLAND²)

2. Principles of species protection

- a. **are there any specific principles formulated in law or in court decisions or academic debate; is a species-by-species approach followed? (please give example)**

Protection and conservation of nature is based on the:

- principles common for the environment as a whole: sustainable development and use, prevention, precautionary, cooperation, polluter pay principle
- in Nature Conservation Act law there are not formulated specific principles of nature or species protection
- but in legal literature authors formulated some³:
 - a) principle of sustainable management of natural resources
 - b) principle of complexity of nature protection
 - c) principle of planning of nature conservation
 - d) principle of the universality of nature protection

² http://ec.europa.eu/environment/eir/pdf/report_pl_en.pdf

³ Cf. M. Król, (in:) M. Górski (ed.) *Environmental Protection Law*, Warszawa 2014, p. 518-520.

Species-by-species approach is not *expresses verbis* formulated but can be derived from provisions (e.g. separately adopted protection programs for a certain species; an authority awarding a status of a protected species introduces appropriate to the protected species limitations, prohibitions and orders; the species' protection may be a strict or a partial one depending on need of the species)

III. Directive 92/43

1. Surveillance of conservation status – (art 11, art. 14 HD)

- a. The CJEU underline the necessity of detailed, clear and in precise manner transposition of art. 11 HD as well as fundamental role of surveillance (monitoring) of conservation status of species of Community interest (Case C-6/04) - How, if at all, is this obligation is transposed and followed in domestic law in practice?
- b. what about omissions and measures to remedy them?

In Poland a quite comprehensive system of environmental (including nature) monitoring has been established. It consists in:

- The state environmental monitoring .
- The Nature Conservation Act places nature monitoring within the framework of the state of the state environmental monitoring.
- The Chief Inspector for Environmental Protection is responsible for nature monitoring of biological and landscape diversity within the framework of the state monitoring of the environment
- As a part of the subsystem of the nature monitoring, monitoring of protected species is implemented, among others
- According to the Nature Conservation Act “the monitoring of the nature consists in observing and evaluation of the status and the changes occurring in the elements of biological diversity and landscape, including the types of habitats and species which are subject to the Community interest, with particular consideration of types of natural habitats and species of priority importance, as well as in assessing the effectiveness of the methods of nature conservation which are used”.

2. Conservations of species (art. 12 -16).

The objective of part 2: Taking into consideration the way of interpretation of art. 12-16 HD by the CJEU whether the very small room for derogation is actually followed in the Member States.

2.1. Art. 12-13 HD - system of strict protection for animal and plant species

To what extent does your national law fulfil the requirement laid down in art 12 and 13 HD and the requirements for clear and precise transposition?

It is settled case-law that the transposition of that provisions requires the Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures.

More detailed issues can be considered in this context include:

- a. *specific measures aiming to establish a comprehensive system of strict protection where chosen in your country (statutory, administrative or contractual measures) – **statutory***
- b. *specific measures (not only prohibitive) adopted to achieve comprehensive and effective system of strict protection (e.g. species action plans, special management plans, monitoring, regulating the population of animals having an impact on protected species, liability for caused by relevant protected species to property etc.) – **yes, all of these measures are foreseen***

- c. *the inclusion of proactive habitat management measures (the restoration or improvement of the habitats e.g. in case of a species for which no protected areas are provided (opinion of AG in case C-383/09) – yes*
- d. *the way of understanding provided in art. 12 (1) concepts of “deliberate”, “disturbance”, “destruction”, “deterioration” Do you have examples of case-law exploring these concepts?*

STRICT AND PARTIAL PROTECTION

Species protection of plants, animals and fungi, their habitats and refuges (sanctuaries) is aimed at ensuring survival and appropriate conservation (protection) status of wild protected species, their habitats and refuges (sanctuaries), as well as preservation of species and genetic diversity.

The very protection applies to species that are rare, endemic, vulnerable and in danger of extinction and covered by protection under the provisions of international agreements to which the Republic of Poland is a party.

It is carried out by extending to certain species:

- **strict conservation with specifying the species requiring active protection; strict protection involves rare or endangered species;**
- **partial conservation**
- **partial conservation, which can be taken of**
- **protection of species’ habitats and/or refuges in the form of protection zones.**

Submission a species under protection by the Minister competent for the environment in an ordinance **is associated with the establishment of necessary prohibitions⁴** universally applicable but not of an absolute nature **and (or) necessary active protection⁵ in relation to protected species.**

Strict or partial protection means that a certain species (e.g. animals) are protected in the whole country what means that they are protected regardless the place of their occurrence. Although dwelling of such animal in areas covered by an area-related protection (e.g. national park, Natura 2000 site) brings about their additional protection resulting from a protective regime of the protected area. In the case of overlapping protection regimes (a species’ protection regime and, for example, a regime of a national park or a Natura 2000 site) its protection comes into being pursuant to the protective regimes for respective forms of nature conservation, and in the case of a collision between the regimes, the strictest regime applies.

SPECIES ACTION PLANS:

Programs for the protection of endangered species of plants, animals and fungi which are developed by the General Director of Environmental Protection. They provide an analysis of the population status of the species, the identification of hazards, and an assessment of past protection practices.

⁴ Like: deliberate killing; deliberate mutilation or capture; transport; farming; taking (acquiring), detaining or possession of species’ specimens etc.

⁵ The following methods of protection can be potentially (depending on the need) applied: 1) making inventories, assessing the state of preservation, monitoring sites, habitats; 2) establishing protection zones of refuges, breeding sites or places where species are present on a regular basis; 3) carrying out protective efforts which maintain an appropriate state of animal populations or habitats consisting in, e.g.: a) renaturalisation and restoration of habitats, b) restoring and carrying out new tree planting, c) building artificial nesting places, watering places, d) adapting methods and time limits for carrying out works in forestry, construction (including hydrotechnical works), and others, so as to minimize their impact on animals and their habitats, d) creating and maintaining ecological corridors, e) creation of animal crossings under and over public roads and railway lines, f) regulating the population of animals having an impact on protected species; g) reintroducing that were bred *ex situ* to the natural environment; g) transferring endangered animals to new sites;

The programs are developed separately for particular species. Six national species protection programs were adopted. There is currently a process of approving conservation programs for six endangered species, and for three further species conservation programs are underway. The estimated risk depends upon kind of species

LIABILITY FOR DAMAGES CAUSED BY RELEVANT PROTECTED SPECIES TO PROPERTY (Bison, wolves, lynx, bears, beavers)

The principle of the State Treasury liability for damages caused by definite animals covered by species' protection is governed by art. 126, sec. 1 of the Nature Conservation Act. In the case of damages caused by protected species, liability (until 2014) was limited only to damages to certain property. The Constitutional Tribunal of Poland has disputed such limitation and in that part the very provision expired.

K 36/13, published in OTK-A 2014/7/75.

The Constitutional Tribunal stated that “*section 1, point 1 – 4 of Article 126 of the Nature Conservation Act differentiates the situation of subjects who suffered damage inflicted by the animals set forth in those provisions, depending on which property the damage was caused. And as for shaping the principles of liability for damages caused by the animals set forth in article 126, section 1, point 1-4 u.o.p. it is irrelevant whether the damage was inflicted in crops (cultivation), agricultural produce or in a forest (agricultural) farm, in headage of livestock, in apiaries or in another kind of property. The legislator's obligation to ensure legal protection of property and of other property rights equal for all stems from Article 64, section 2 of the Constitution⁶. Depriving some of the subjects the right to seek damages (compensation) may have a negative impact on the implementation of species' protection, since it does not lead to a greater acceptance of the prohibitions arising from the Act. This may result in activities aimed against the protected species, so as to prevent damages to arise*”.

The very liability for damages caused by defined protected species may be described by the following features:

- 1) it is a civil law liability of the Treasury State, but it has its own principles, which may differ from the principles contained in the Polish Civil Code,
- 2) it is the liability which is limited to the so-called actual damages (*damnum emergens*) which are distinguished from lost profits (*lucrum cessans*),
- 3) it is the liability of an objective nature, but not an absolute one (e.g. if the aggrieved party failed to grant the consent to having damages-preventing equipment built or procedures performed by the RDOŚ [RDEP] or by a director of a national park)

2.2. Art 15 HD - the prohibit to use of all indiscriminate means of killing (Is there a general prohibition of using all indiscriminate means of killing or the specific list of such means?)

There is a general prohibition of using all indiscriminate means of killing together with the sample catalogue of prohibited means of killing (examples of 17 indiscriminate means of killing).

2.3. Art. 16 HD - derogation from the provisions of Articles 12, 13, 14 and 15 HD

- a. whether derogations from the prohibitions related to protected species are of general (e.g. C-412/85 the normal use land for agriculture, forestry or fisheries) or individual nature (permission in each case)? – both**

⁶ According to Article 64 section 2: “Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession”.

Derogation from the prohibitions related to the species' protection may have a general or an individual nature. **Four categories of derogations - of general or individual character:**

- a general derogation from certain prohibitions in law (e.g. capturing stray wolves in built-up areas by entities authorized by the RDOŚ and moving them to places of regular occurrence)
- a general derogation in NCA related to the carrying out of fishery management. According to the Nature Conservation Act the fishery management does not violate the certain prohibitions set forth in law as long as it is carried out on the basis of requirements of good fisheries management practice, whose arrangements ensure that activities carried out in accordance with them are not detrimental to the maintenance of the species the species in the appropriate conservation status.
- individual consent of the competent nature authority (GDOŚ or RDOŚ); permits may be issued in the absence of **alternative solutions**, if they are **not detrimental to the maintenance of the populations of a protected species** living in the wild at an appropriate conservation status (the general premise) as well as when there is one of **the specific premises** (e.g. the interest of conservation of wild species or protecting natural habitats⁷, to reduce serious harm in relation to property⁸, the interest of public health or safety, for research)
- temporary authorization of the Regional Director of Environmental Protection to derogate limited to defined species. RDEP may authorize, for a limited period of time, not more than five years, **by way of local law in the form of an ordinance**, activities subject to the prohibitions referred to in Article 1. 52 sec. 1. NCA (e.g. deliberate killing); this ground is limited to certain animals (*European beaver, black cormorant and gray heron*). Authorization may be issued in the absence of **alternative solutions**, if they are **not detrimental to the maintenance of the populations of this protected species** at an appropriate conservation status as well as when **there is one of the specific premises**: health or public safety or in case of cormorant reduce damages to forests, fish stocks or water or in case of European beaver reduce serious damage to crops, livestock, forests, fish, water or other property.

b. does national law go beyond the specific grounds justified removals described in art. 16 HD? –the transposition is correct now

Case C-46/11 Improper transposition of art. 16 HD – the general nature of derogation

In relation to protected species of plants and animals the Court of Justice of the European Union in its judgment of 15 March 2012 *European Commission v Republic of Poland* (Case C-46/11) declared that Poland failed to transpose correctly the conditions governing the derogations laid down in Article 16(1) HD. According to the Court the provisions of the Nature Conservation Act and the regulations of the Minister for the Environment in relation to protected species of plants and animals occurring in the wild, which provided the possibility of providing for a derogation, for purposes of the 'prevention of serious damage, in particular in agricultural or forestry holdings or in fisheries', from the obligations connected to the protection of species was more extensive in scope than the derogation provided for in Article 16(1)(b) HD.

⁷ As an example on this premise GDOŚ allowed to kill a total of 8 heads of wolves in period 2013-2015; GDOŚ indicated that there are no alternative solutions, because leaving the individuals hybrid (wolf and dog) may result in subsequent litters of hybrid that will threaten the purity of wolf population.

⁸ On this premise GDOŚ allowed to kill a total of 8 heads of wolves in period 2013-2015, GDOŚ indicated that there are no alternative solutions, because despite the use of a number of safeguards there was still attacks on livestock; in one case GDOŚ refused to allow to kill one wolf because lack of existence of alternative solutions had not been proved.

The Nature Protection Act and the Regulation has been changed by modifying the above prerequisite justifying the individual derogation to the following one: “a necessity to limit serious damages in relation to agricultural crops, livestock, forests, fish stocks, water or any other types of property”. The way of implementation is correct now.

- c. how the three test approach is interpreted according to administrative adjudication, court decisions or academic debate (what is and what is not regarded as i) favorable conservation status, ii) specific reason (e.g. “reason of overriding public interest”), iii) satisfactory alternatives (what is the scope of alternatives be considered)?**
- d. are compensation measures (although not obligatory in art. 16 HD) adopted?**

PERMISSIONS GRANTED FOR THE REDUCTION OF PROTECTED ANIMALS IN 2015 (GUS):

SPECIES	Number of permissions granted	Number of specimens	Reason for reduction
Amphibians	9	95	Investment or for research
Fish	26	1487	for research
Leeches European Medical Leech	13	More then 90000	for medical purposes
Insects	126	30090	for research
Mammals (wolf)	5	5	damages, hybridization
Mammals (Eurasian River Otter)	61	463	Damages
Mammals European Beaver	407	887	damages, public safety, commercial use, for research
European Bison	6	29	
Birds	244	12720	Damages, air safety, research

2.4. Art. 22 HD

a. Is the desirability of re-introducing native Annex IV species used?

Species protection of plants, animals and fungi *in situ* is supplemented by an *ex situ* conservation of species in danger of extinction in natural environment carried out in zoos, botanical gardens or gene banks, which, as it is assumed, should aim to reintroduce specimens of these species to environment.

Desirability of reintroducing native Annex IV species has been used in practice – e.g. in 1993, an innovative reintroduction process of Lynx was launched. 30 adults, mainly from the ZOO were transfer to the Puszcza Kampinowska. Although positive effect of this introduction there were also negative one (the deaths of several dozen individuals were reported cause by car traffic, poaching and disease)

b. the deliberate introduction of non-native species is regulated - is it prohibited?⁹

⁹ <http://www.gdos.gov.pl/invasive-alien-species>

The issue is regulated by the **Regulation No. 1143/2014** on preventive and remedial actions with respect to the introduction and spread of invasive alien species and the **Nature Conservation Act** which:

- prohibits to introduce alien species of animals, plants or fungi to the natural environment and to move them within this environment; storage, breeding, reproduction, offering for sale and sale of alien species that could not pose a threat to native species or natural habitats in case of their release into the natural environment (alien invasive species) is allowed only with a permit granted by a competent Regional Director of Environmental Protection; import of alien invasive species requires a permit of the General Director of Environmental Protection.

2.5. Overlapping between Annexes

- a. what is the practice/ possible scenarios/legal requirements of simultaneous application of derogations under Articles 6 (4) HD and 16 HD

Simultaneous application of derogations under Articles 6 (4) HD and 16 HD is not applied. In each case the applicant needs two decisions.

IV. Art. 5-9 of the bird directive contain similar provisions and their interpretation by CJEU can be applied to art. 12-16 HD. One can an example of significant case illustrating the application of art.5-8 and 9 BD or indicate main problems or improper implementation.

V. Enforcement (legal consequences of infringement of art. 12-16 HD or 5-9 BD)

- a. What sanctions are used (eg criminal, administrative or civil means); which is the most effective?
- b. How is the obligation to monitor incidental capture and killing of animal species (Article 12.4 HD) is transposed and applied; is there a national system of monitoring all relevant species covering the whole territory or is limited to particular species/areas/causes; have any conservation measures been introduced as a remedy to avoid incidental killing or capturing having a significant negative impact on the conservation status of the species ?
- c. Please give two examples of what you consider the most important national legal cases dealing with area of the law (if any).
- d. Has the Environmental Liability Directive and how it has been transposed played any role in your country in species protection?

Administrative sanction, e.g.:

- According to the Nature Conservation Act undertaking activities which could considerably adversely affect the conservation objectives of a Natura 2000 site without obtaining a required permit results in the issue of a decision which orders, depending on the needs, their immediate cessation, or undertaking the necessary preventive or remedial activities (Art. 37 sec. 1)
- Environmental Liability Directive - more effective in case of Natura 2000 damages than damages to protected species outside protected areas.

<p>For example in case of destruction of nesting sites of the swift or closing vent openings as a result of fitting thermal insulation on a building which had been used by the swift every year as a nesting site there are obstacles to using this enforcement mechanism the court states that the authority can not impose the obligation to take corrective action at a particular facility, relying only on assumption that each vent or fissure in building facade could pose a potential nesting site (habitat) for Swift</p>
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Environmental Liability Directive damage to the environment consist of killing of 2 wolves in the Natura 2000 site during the organized collective hunting by two hunters

Judgment of the Voivodship Administrative Court in Warsaw of 5 August 2013, IV SA/Wa 1162/13

The case concerned the occurrence of damage to the environment consist of killing of 2 wolves in the Natura 2000 site during the organized collective hunting by two hunters. The proceedings was against forest district - an organizer of hunting.

The applicant argued that in this case taking corrective action was not possible as the damage had been irreversible. So he brought about imposing on the organizer of hunting to take preventive actions consist of creating in this site an optimal environment for the wolf and minimizing the risks posed for wolf by hunting by exclusion of collective hunting in Natura 2000 sites, among others.

The competent authority refused to impose on the organizer of hunting such obligation because it was not possible to demonstrate fault or negligent of the organizer of hunting; he damage occurred as a result of actions of third parties (hunters).

The Voivodeship Administrative Court shared this opinion. The court found that the organizer of hunting in the absence of fault is not liable for damage to the environment in the form of killing two wolves. The court pointed out that the hunt took place in the presence of a representative hunting circuit manager, the hunters were informed by the organizer of hunting about it on what animals they could hunt (i.e. raccoon dogs), how many of this game could be shot and about the ban of killing wolves. The organizer of hunting, in this circumstance, could not predict that hunters confuse the animals and even more that in general (as the applicant claims) do not know what they hunt and how the raccoon look like.

The court pointed out that the organizer has also taken actions to prevent similar incidents in the future through monitoring, educational activities, increasing the efficiency of briefing for hunters by familiarizing them with the image of animals, protected species.

Criminal responsibility can play an important role. The obstacles are in many cases impossibility of indicating perpetrators or the absence of attributes of an offense (“substantial destruction” and “substantive damage”, appropriate quality of the species’ protection”). So it’s why an important legal basis is art. 132 NCA which penalize different illegal activity regardless of the consequences of such act for the status of protected species.

Criminal Code:

Art. 181 of the Penal Code) Art. 181 of the Polish Criminal (Penal) Code:“§ 1. Whoever causes **substantial destruction to plant or animal life**, is subject to the penalty of deprivation of liberty for between 3 months and 5 years.

§ 2. Whoever, against the provisions of law being in force in a protected area, inflicts **substantive damage by destroying or damaging plants or animals**, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years.

§ 3. Whoever, irrespective of the place of the commission of the act, inflicts **substantive damage by destroying or damaging plants or animals** under protection, is subject to the penalty provided for in § 2.

§ 4. If the perpetrator of the act referred to in § 1 acts unintentionally, he is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years.

§ 5. If the perpetrator of an act referred to in § 2 or 3 acts unintentionally, he is subject to a fine or the penalty of limitation of liberty”.

Art. 181 of the Penal Code was successfully used by the court in the case of two hunters who were found guilty of an offence under Article 181 section3 of the Penal Code (intentional killing of two

wolves) and sentenced each of them to: three months imprisonment suspended for 3 years, 20 thousand PLN. fines and 8 thousand PLN exemplary for environmental fund. They shot 2 wolves during the organized collective hunting explaining afterwards that allegedly confused them with raccoon dog.

Nature Conservation Act:

Art. 127 of the Nature Conservation Act penalizes a deliberate violation of prohibitions which are binding in the protected areas (under threat of arrest or a fine).

Art. 127a. 1 of the Nature Conservation Act “Whoever, in a manner contrary to the provisions of the Act, comes into possession of specimens of plants, animals, fungi covered by species’ protection, amounting to a number superior that insignificant, in such conditions or in such a manner that it **maintenance of an appropriate quality of the species’ protection**, is subject to the penalty of deprivation of liberty for between 3 months and 5 years.

2. If the perpetrator of the act referred to in § 1 acts unintentionally, he is subject to a fine, a fine or the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years.

Art. 131 of NCA penalize illegal activity (e.g : violation the prohibitions in relation to protected plants, animals and fungi (sanction: jail or a fine).

VI. SEA, EIA, Appropriate Impact Assessment and species protection

- a. how the species protection is reflected in the SEA assessments since the latest CJEU court cases on SEA Directive (C-290/15) indicate that mistakes in SEA-procedure will make legislation as well as decisions based on plans invalid?
- b. how do the administration or courts deal with the investigation of the project (permits for operations) with a foreseeable impact on strictly protected species; what is “deliberate” in this context; how are the conditions for the operation designed and what happens if damage occur despite those conditions? (*e.g a wind park in Southern Sweden where 11 birds of prey have been killed only during 2016*).
- c. what about the activity not restricted by individual decision (e.g. sport event in the protected area, cutting trees by the owners of the land not for economic activities)

Example: Judgement of the Voivodship Administrative Court in Warsaw of 31.01.2012, IV SA/Wa 1803/11

The case concerned the decision on environmental conditions (hereinafter: environmental decision) for the planned project involving the adaptation of a road to the standard of expressway. The project interfered with ecological corridors including those of European and national importance, so the question was how many passages for large animals and where should had been build. This issue was examined in the administrative proceeding and was subject of the carried out EIA (environmental impact assessment). The authority took into account: (a) conducted field observations of movements of animals between August - September 2009 at the proposed places of location of passages for large animals; (b) information on animals’ collisions with cars in this area (for a period of 1.5 years); (c) opinion of interested parties, including NGO. In result the authority issued the environmental decision for the project and imposed on investor the obligation of to build 5 passages for large animals in certain sections of the road as well as the obligation to carry out EIA once more at the next stage of the investment process, which would allow re-examination of selected locations of passages for large animals and the need to increase their numbers.

Environmental organizations challenged the environmental decision to administrative court. The disputed issue was the need to locate additional two passages for large animals. The court did not

share arguments of the NGOs. The court found that the authority properly had determined the location and density of passages for animals and had taken into account both natural and technical parameters. The court also pointed out that at the next stage of the administrative proceeding this issue (localization of passages for animals) would be re-examined and re-considerated.

VII. Agricultural or forestry activities with a foreseeable impact on protected species

a. are there derogations from species regime in every case, general exclusion (*binding general guidelines, recommendations, code of conduct, best practice others, etc*); what is the legal procedure if they are ignored?

According to the Nature Conservation Act the fishery management does not violate the certain prohibitions set forth in law (like: deliberate killing, mutilation or capture, deliberately destroying their eggs, juvenile or developmental forms; transportation; destruction of habitats or refuges, which are their area of breeding, rearing, resting, feeding or migration; destroying, removing or damaging sockets, anthills, burrows, dugouts, harbors, spawning grounds, wintering grounds or other shelters; deliberate scurvy or disturbance; deliberate disturbance or disturbance in accommodation places, during the breeding season at breeding sites or in rearing or in feeding areas of migratory or winter migratory birds; deliberate relocation from regular places to other places) as long as it is carried out on the basis of requirements of good fisheries management practice, whose arrangements ensure that activities carried out in accordance with them are not detrimental to the maintenance of the species the species in the appropriate conservation status. The Minister competent of fishery policy should determine by regulation the requirements of good fisheries management practice, guided by the need to preserve protected species in good conservation status, in particular species of Community interest and protected bird species. It is worth to mention that in practice this legal basis for derogation (as far as we get known) has not been applied. The derogation on the basis of the “requirements of good fishery practice” cannot be used at all as until now the Ministry of fishery policy has not specified them in the regulation.

Similar quasi-general derogation but related to the carrying out of forest management was valid until the end of 2016. According to the NCA the forest management does not violate the prohibitions set forth in statutory law as long as:

- it is carried out on the basis of forest arrangement plans, which have undergone a strategic environmental impact assessment, including the impact on existing wild populations of species which are subject to the Community interest as well as on their habitats;
- or it is carried out on the basis of the requirements of good practice within the scope of forest management, whose arrangements ensure that activities carried out in accordance with them are not detrimental to the maintenance of the species at an appropriate conservation status.

This provision was not compatible with the EU law as for the derogation it links to the “the impact on existing wild populations of species” or “the maintenance of the species at an appropriate conservation status” and not also to the alternative solution and individual premises (like: scientific research, or the need to reduce serious harm in relation to livestock). The objection of inconsistency of this provision with EU was disputed both at the national level (GIOS) as well as EU level (with the Commission) and it was repealed with effect from 1 January 2017.

b. are agri-environment, forest, aquaculture financial assistance/support effectively used in development of sustainable forestry, agriculture or aquaculture?

c. are there other forms of support (e.g. agreements with the owners of the property)?

If an economic, agricultural, forestry, hunting or fishing activity requires adaptation to Natura 2000 conservation requirements that do not apply to income support schemes, the regional environmental director may enter into an agreement with the owner or holder of the area, which lists the necessary

activities, the methods and deadlines for their implementation, the terms and conditions of settlement of receivables for performed activities, and the value of compensation for lost revenues resulting from the introduced restrictions.

Some financial assistance/support which could be used in development of sustainable forestry, agriculture or aquaculture are agri-environment programs (financing from the EU funds), which are a financial instrument to encourage farmers to apply agricultural practices leading to the greening of agricultural production, which should be more than good agricultural practice. Agri-environment programs are designed to ensure the integration of the development of the agricultural economy with the protection of the environment by minimizing the negative effects and maximizing the positive effects of agricultural activity.

An environmentally friendly farming system includes:

- limitation of negative environmental effects resulting from the production process,
- care about the natural and cultural values of the farm,
- introduction of restrictions on the use of means of production to exploit the natural production potential

VIII. What exactly are the roles of citizens and NGOs in species protection?

- a. how national law - having in mind the lack of UE rules on the one one hand, on the other the obligation arises from Aarhus Convention - deal with public participation and access to justice in species protection proceedings?

The proceedings concerning the making decisions after EIA are classified as **“the proceedings requiring public participation”**. In this kind of proceeding there is an opportunity for everyone to lodge comments and motions and for environmental organizations to participate in the proceeding as a party to the proceedings and to lodge a complaint, even if ecological organization does not participate in administrative proceedings.

The proceedings concerning **the making decisions/permits for derogations from the prohibitions arising from the species' protection are not classified as “the proceedings requiring public participation”** and therefore public participation in these proceedings is based on general provisions of the Code of Administrative Proceedings. It mean that there is no opportunity for everyone to lodge comments and motions and that (according to art. 31 of the Code of Administrative Proceedings), a social organization may participate in proceedings as a party to the proceedings if it is justified and then lodge a file. No rights for public as such.

The most limited rights have the public in the proceedings concerning the drawing up documents or when the authority issues act of local law (see point III 2.3.) . Even if the public can participate in such proceeding, it has limited rights to lodge complaints against such documents or act of local law. Following the general principles of Polish law, the possibility of lodging a complaint with the administrative court depends in principle on whether a given document/act has the status of an act of local law and whether **it violates the complainant's legal interest**.

- IX. **Direct applicability** - are EU provisions on species protection directly applied in case of improper transposition? , no cases found, but the answer is they should be